IN THE

SUPREME COURT OF THE UNITED STATES

No. 617

ALGERNON BLAIR, *Petitioner*

vs.

UNITED STATES OF AMERICA, *et al*

Petitioner prays for a rehearing of its petition for certiorari in this case which was denied on April 26, 1948 on the ground that the court acted on the petition before petitioner had an opportunity to reply to the brief in opposition which presented entirely new views on the question presented.

The brief in opposition presents entirely new views on the rights and liabilities of the respective parties. It is different from those of the Circuit Court of Appeals, which in turn, were different from those of the District Court and of the administrative officers in charge of the work.

These differences as to the meaning of a government contract serve to emphasize the need for this court to pass upon and settle the law applicable. Especially is this true in view of the fact that neither side has been able to cite any case construing the contract in a case of this kind.

The conflict in principal between the holding of the court below and the *Fairmont Coal* case of the Seventh

Circuit and its own case of The Gulfport further emphasizes the necessity for this court to pass upon the questions here involved.

The position taken in the brief in opposition to the petition that this is a construction case and not one of bailment is not supported by the facts. The contractor was employed to move the houses, not to build them. The houses were of the prefabricated type which, as everyone knows, are built in wall sections with the windows and doors already installed, in roof sections with the roofing already applied, and in floor sections with the flooring already on. These sections, when assembled, form a house. The houses in this case had been previously assembled at Grenada, Mississippi. The contractor was employed to take them apart there and put them together again at Key West. Although there were certain items of incidental work such, for example, as site preparation and the furnishing of some household fixtures, such as water heaters and other similar appliances, it was essentially a matter of moving government houses from one place to another. The claim here is for the cost of repairs to the houses, the walls, roofs, windows, screens and other parts of the houses and not for any loss or damage to the equipment furnished by the contractor.

It is not accurate for the opposition brief to state the "Question Presented" as one involving a contract to "perform the work for construction of a War Housing Project" when it was not a construction contract but a moving contract.

A contract to furnish materials and build houses is entirely different from a contract to move houses already built and owned by the government. One is a construction contract where the contractor is required to complete the building in order to fully perform his contract. The

other, this case, is a contract of bailment where the bailee is merely moving Government property from one location to another. The rules of law governing the two kinds of cases are different.

Thus, the first argument made in the opposition brief (page 3, 1) that the obligation to reassemble the houses at their new location could not be discharged until the work was completed and that the contractor could complete the work only by repairing the hurricane damage, however sound in the case of a contractor obligated to build houses out of materials furnished by him, has no application in this case. The contract was to move the houses, not to repair them. True, there was the duty on the contractor to use reasonable care in moving the houses but unless so stipulated in the contract, he was not an insurer. Clark vs. U. S. 95 U. S. 539.

Neither in its defensive pleadings or in its evidence did the government seek to charge the contractor with even the slightest negligence in this respect nor did the trial court so find. It is out of place for the opposition brief to argue that hurricanes are "common in that part of Florida" and are "foresseeable" (brief p. 5) with the inference that there was something which the contractor could have done to avoid the damage. No such defense was made and there is no evidence to justify the implied suggestion that the contractor was negligent. The situation would be radically different in the case of a contract to furnish materials and build houses on a completed contract basis and the cases cited in the opposition brief (page 5) might apply. For the most part the cases cited are construction cases, not cases of bailment where the object of the bailment has been damaged by act of God and the contractor has been required to repair the damage which was no part of his contract and as found by the

District Court "was not contemplated by the parties . . ." (R. 121).

The rule quoted in brief (page 5) "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused, etc., because unforeseen difficulties are involved" is not applicable here because the contractor did not agree to build the houses or to repair them in event of storm damage but only to move them, with no agreement, as petitioner contends, to insure them in the meantime.

It would be more apt to quote from Dermott vs. Jones, 2 Wall. 1, 17 L. ed. 762:

> "It is well settled that if the party, by his contract, charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party."

The second argument (brief p. 5, 2 (a)) which concedes, *arguendo,* that the contract was one of bailment but argues that the contract explicitly imposed the risk upon the contractor is based on certain provisions of the contract:

Division DTH-1, Section 3, is the provision upon which the holding of the Circuit Court of Appeals is mainly based but the brief in opposition makes no effort to explain why such an important contract provision, which it is claimed enlarges the responsibility of a bailee from that of exercising reasonable care to that of an insurer, should be an obscure clause, not in the 22 numbered "Contract" articles, nor in the 20 pages of "General Condition" but in the back part of a thick book in a division

entitled "Removal of Equipment and Appurtenances" dealing with such relatively inconsequential details as removal and storage of kitchen tables, curtain rods, and the like. Thus located in a division dealing with equipment and making mention of "loss" and "breakage" it would seem that what was in the mind of the author was the idea of specifically fixing the time when the responsibility of the contractor would begin and to leave no doubt that as soon as "Notice to Proceed" was given he would from that time be considered as in possession and "responsible."

The cases cited to offset the Fairmont Coal case, brief page 8, are all readily distinguishable on their facts. Indeed, in several of them it is expressly stated that the Fairmont Coal case involved different facts. For example, in the Mills Factors case the agreement was to "assume full responsibility" thus indicating the intention of assuming additional responsibility over and above that ordinarily upon the bailee and this additional assumption is further indicated by the use of the word "full" to show that the responsibility thus assumed was unconditional.

In each of the cases cited there was some controlling feature which is absent here, to clearly indicate an intention to enlarge the ordinary responsibility of the bailee.

Moreover there was lacking in each of those cases the point which is present here that the language by which responsibility as an insurer is contended for was used by the bailor who drew the contract.

Especially to be noted also is that none of the cases cited was the loss caused by act of God. In the Commercial Electric Supply case the court distinguished another case, the Whitehead case, because in that case the loss was caused by act of God.

"Responsible" does not mean liable as an insurer. In *State vs. Grand Forks County,* 71 N. D. 827, 300 N. W. 355, the court wrote:

> "The language of Section 2183 supra . . . is: 'Each county is responsible to the state for the full amount of tax levied for state purposes. The argument is that this language makes the counties unconditionally liable for all state taxes collected by their respective treasurers. Ordinarily the word responsibility connotes a conditional rather than an unconditional liability. It is a word which is commonly used to describe the relationship of executors, guardians and other trustees to property which has been placed in their charge. Trustees are responsible for trust property but they cannot be made liable for any loss or depreciation of the fund entrusted to them so long as they keep themselves strictly within the line of duty and exercise reasonable prudence, care and diligence . . .
>
> "Giving the word 'responsible' its ordinary meaning, we think that Section 2183, supra, imposes a condition of potential liability and accountability upon counties for state taxes and that a county's duty to account may be met by showing that the county officers have adhered strictly to the statutory directions of the State Legislature and having acted with honesty, prudence and diligence."

In that case the funds had been lost in the failure of a bank which was a legal depository. There, even though the loss was not caused by act of God the word "responsible" was not held to enlarge the normal degree of liability.

The provision that the "contractor shall be responsible . . . etc." merely states the ordinary liability of the

bailee. What is stated in the Mulvaney case cited in the opposing brief (page 6) is applicable here:

> "When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language (assuming the responsibility) is no further bound than he would have been without it." Mulvaney case cited page 6.

Nor are Sections 16 (c), 19 (a), or 33 (a) any help. Neither of the lower courts gave either of these sections any significance.

Section 16 (c) relating to work covered by partial payments has no bearing on whether the contract explicitly makes the bailee here an insurer.

Section 19 (a) "Care of Work" provides that the contractor shall be "responsible" for damages that occur "as a result of his fault or negligence." This section instead of lending strength to the argument that the contract makes the bailee an insurer, indicates that the opposite is true and that he is responsible only for his fault or negligence and there is no defense here made that the contractor was in any way at fault or negligent in even the slightest degree.

Section 33 deals with equipment, its loss or theft. The case is about damage to the buildings, their roofs, windows, painting and the like, not the loss or theft of "equipment."

Thus, neither of these new articles, now brought to light for the first time, could be fairly construed to make the bailee an insurer. Especially is this so in a contract drawn by the bailor.

Finally the opposition brief (2 (a), p. 8) refers to Article 9 of the contract. This article is entitled "Delays-Damages." Subsection (2) provides that the contractor

shall *not* be charged with *delay* caused, among other things, by acts of God and subdivision (b) provides that he shall not be held liable for damage done by armed forces or civil commotion. This article does not provide that the contractor shall be liable for damage caused by act of God. It is not, as intimated by the opposition brief, page 8, up to the bailee to find an "exception" in the contract from absolute liability because until the contract in its express terms increases his normal responsibility from that of the duty to exercise reasonable care of the government's property to the extraordinary liability as an insurer he is responsible only for ordinary care. There is no such provision in the contract documents. Nor would it be logical at all to conclude that because a contract provides that a contractor shall not be liable for *delay* caused by act of God that he should, therefore, be held liable for *loss* so caused.

In conclusion it is, therefore, submitted that the case was incorrectly decided in the court below and that the question is of sufficient importance to warrant a decision by this court, and that the petition for certiorari should be granted.

FRED S. BALL, JR.,
Attorney for Petitioner.

April 1948

I hereby certify that this petition is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

FRED S. BALL, JR.